IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 750 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

KODARSINH JOITUSINH PARMAR

Appearance:

1. Criminal Appeal No. 750 of 2001

MR PANDYA, ADDL.PUBLIC PROSECUTOR for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 25/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

State has preferred this appeal against judgement and order rendered by the Additional Sessions Judge, Sabarkantha at Himmatnagar in Sessions Case No. 72 of 2000 on June 19, 2001. The respondent accused was tried by the trial Court for the offence of murder of Alkaben by setting her ablaze. The trial Court, after considering the evidence led by the prosecution, came to the conclusion that the accused cannot be convicted of the charges and therefore recorded acquittal and hence, this appeal.

2. As per the prosecution case, deceased Alkaben was a widow. She had two minor children. It is the case that the respondent used to exploit Alkaben and demanded illicit relations. The alleged incident occurred on Sept. 24, 1998, when it is alleged that the respondent went to the house of the deceased and demanded Rs. 1600/- received by her as an aid from the Government. She said that she had deposited the amount in the Post office. This resulted into a quarrel and ultimately it is alleged that the respondent poured kerosene on Alkaben. Alkaben was at that time cooking in the kitchen. Alkaben was taken to the hospital with 90 to 95 degree burns and was given treatment. Her dying declaration was recorded by the Executive Magistrate, wherein she stated that she sustained burns while she was trying to fill-up a burning stove with kerosene. It is the case of the prosecution further that the deceased had disclosed the incident to her mother wherein she inculpated the present respondent. Ultimately, Alkaben succumbed to the injuries and two days thereafter her mother lodged the complaint. It is the case of the prosecution that two minor children of Alkaben were present in the house at the time of the incident. They have been examined by the prosecution, but their deposition is not believed by the trial Court.

2. We have heard learned APP Mr. Pandya. We have perused the record and proceedings of the Sessions Case which is before us. We have gone through the judgement and order impugned herein.

3. It has to be noted that the dying declaration of the deceased recorded by the Executive Magistrate clearly exculpates the respondent accused as she says that she sustained injuries while she was trying to fill-up a burning stove with kerosene.

4. The complainant, mother of the deceased says the deceased had told her that the accused respondent herein had poured kerosene over her and set her ablaze.

Admittedly, the deceased expired on Sept. 25, 1998, whereas the complaint is lodged on Sept. 28, 1998. Remarkably, the complaint is preferred after 3 days. It has also come on evidence that the mother of the deceased was present with her in the hospital at the time of her demise and she has not taken any steps aginst the respondent till lodging of complaint. This gross inaction on her part for 3 days is not even tried to be explained by her. It also appears that a typed complaint is claimed to have been sent by the complainant before the FIR was recorded on Sept. 28, 98. The complaint on 28th Sept. 1998 therefore cannot be considered as FIR and the typed complaint has not come on record. It is also to be noted that there is controversy about the previous complaint regarding whether it was typed or hand-written, but fact remains that no offence is registered on the basis of such alleged complaint.

5. Learned Advocate Mr. Pandya vehemently submitted that deposition of two children of the deceased ought to have been accepted by the trial Court. It is interesting to note that while deposing they have stated that if they lie, Police will beat them. They have also accepted that they have deposed as per the direction of the Police officers. Obviously, they are tutored witnesses under a threat of the investigating agency and much weight could not have been given to that deposition in light of the dying declaration and delayed action on the part of the complainant - mother of the deceased. The statements of the minor is recorded only after 28th of Sept. 1998 i.e. after lodging of the complaint. It is too difficult to accept that minor children who have seen their mother being murdered would not disclose the identity of the assailant for so many days before anyone, leave aside the Police. This lends credence to their admission that they are deposing under fear of Police. In our opinion, learned Judge cannot be said to have been committed any error in not accepting this deposition. Here is a case where two different versions are emerging from the evidence led by the prosecution. One inculpates the accused respondent, the other exculpates the accused respondent. Learned Judge therefore has rightly not believed the inculpating evidence. We are in agreement with the reasonings adopted by the learned Judge and conclusion arrived at him. We do not think the State has any merit in this appeal. Appeal therefore must fail and it is therefore dismissed.

(A.L.Dave, J.) (Akshay H. Mehta, J.)
*/Mohandas